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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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FILED
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No. 1137

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased, and GENEVIEVE SANTANA, individually and as Administratrix of the Estate of VICTOR SANTANA, deceased, and JOHN GUGLIUZZA, individually and as Natural Guardian of RONALD GUGLIUZZA, an infant over the age of fourteen years, and MARGARET MANNING, individually and as next friend and guardian of the Person and Estate of SAMUEL DON MANNING, a minor, and WILLIAM KAY MILLER, as Temporary Guardian of the Estate of DAVID THOMAS, a minor, and ROSALIO TOBIAS, JR., and IRENE COMMUNE, individually and as Administratrix of the Estate of ROBERT E. COMMUNE, deceased, and LORENZO GOMEZ, individually and as Temporary Administrator of the Estate of LUIS A. GOMEZ, deceased, and LORRAINE M. THOMAS, individually and as Administratrix of the Estate of DENNIS WISSELL, deceased, and JACK PASTER, individually and as Administrator of the Estate of RICHARD PASTER, deceased,
Respondents.

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

WILLIAM P. KENNELLY and DOROTHY KENNELLY, as Administrators of the Goods, Chattels and Credits of WILLIAM T. KENNELLY, deceased,
Respondents.

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

DOROTHY WILLS, as Administratrix of the Goods, Chattels and Credits of LEMUEL WILLS, JR., deceased,
Respondent.

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

HON. JOHN F. X. McGOHEY, Judge of the United States District Court for the Southern District of New York,
Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Questions Presented	2
Statement	2
ARGUMENT—The Court of Appeals did not employ an improper standard when it refused to issue the writ of mandamus. There is no conflict among the circuits	5
The District Court did not abuse its discretion in denying petitioner's motion for transfer	8
Conclusion	10

TABLE OF AUTHORITIES

Cases:

A. Olinick & Sons v. Dempster Bros., Inc., 365 F. 2d 439 (2d Cir. 1966)	6
Bankers Life & Cas. Co. v. Holland, 346 U. S. 379 (1953)	5, 8
Ex Parte Fahey, 332 U. S. 258 (1947)	6
General Tire & Rubber Co. v. Watkins, 373 F. 2d 361 (4th Cir.), *cert. denied,* 87 S. Ct. 1031 (1967)	7
Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1946)	8
Gulf Research & Dev. Co. v. Harrison, 185 F. 2d 457 (9th Cir. 1950)	6
Hartley Pen Co. v. United States District Court, 287 F. 2d 324 (9th Cir. 1961)	6
In re Josephson, 218 F. 2d 174 (1st Cir. 1954)	7

PAGE

LaBuy v. Howes Leather Co., 352 U. S. 249 (1957) ... 7

Scaramuzzo v. American Flyers Airline Corp., 260 F. Supp. 746 (E.D.N.Y. 1966) 3, 4, 8

Schlagenhauf v. Holder, 379 U. S. 104 (1964) 5

Schmidt v. American Flyers Airline Corp., 260 F. Supp. 813 (S.D.N.Y. 1966) 3, 4, 8, 9, 10

Teixeira v. Goodyear Tire & Rubber Co., 261 F. 2d 153 (1st Cir. 1958) 6

Will v. United States, 389 U. S. 90 (1967) 6, 7, 8

Wong Wing Hang v. Immigration and Naturalization Service, 360 F. 2d 715 (2d Cir. 1966) 8

Statute:

28 U.S.C. § 1404(a) 2

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Questions Presented

1. Whether the Court of Appeals for the Second Circuit used an improper test in determining whether mandamus should issue?

2. Whether the District Court abused its discretion in denying petitioner's motion to transfer when petitioner failed to make a clear and indisputable showing of its right to transfer?

Statement

Petitioner American Flyers Airline Corporation has sought to have transferred from the Southern District of New York to the Eastern District of Oklahoma twelve actions* for compensatory and punitive damages for three survivors and nine decedents as a result of the crash of petitioner's aircraft on April 22, 1966 near Ardmore, Oklahoma.

Petitioner is a certificated Supplemental Air Carrier doing business "in a very considerable number of States in the United States" (Petition, p. 4)† including New York. At the time of the transfer motion it owned ten multi-engined aircraft; for the calendar year 1966 it accrued almost nine million dollars in sales revenue.

The aircraft which crashed was carrying 92 soldiers of whom 77 were killed and 15 survived. As of the time of petitioner's transfer motion before Judge McGohey, of the

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* At the time of petitioner's initial motion under 28 United States Code, § 1404(a) before Judge McGohey, District Court Judge for the Southern District of New York, there were fifteen cases pending in that district. Three of those cases have been settled.

† References to the petition for certiorari hereinafter will be referred to as "P". References to the appendix to the petition will be referred to as "P. A."

forty-eight unsettled cases, fifteen involved injured passengers or survivors of deceased passengers residing in the New York, New Jerey and Connecticut area. Only one of the forty-eight cases involved an Oklahoma resident.

At that time, in addition to the fiften actions pending in the Southern District of New York, there were nine actions pending in the proposed transferee district; one action pending in the Eastern District of New York; one in the Eastern District of Arkansas; two in the Northern District of California and one in the Central District of California. Of the nine cases pending in the proposed transferee district only one case had been started here.

Prior to petitioner's motion to transfer brought on before Judge McGohey, its motions to transfer had been denied by Judge Mishler twice in *Scaramuzzo* v. *American Flyers Airline Corp.*, 260 F. Supp. 746 (E.D.N.Y. 1966), and once by Judge MacMahon in *Schmidt* v. *American Flyers Airline Corp.*, 260 F. Supp. 813 (S.D.N.Y. 1966).*

Judge Mishler considered the factors urged by petitioner as reasons for transferring the case. He reasoned that:

> "If the determination of this motion were to rest on the balancing of the convenience of fact witnesses on the liability issue alone, the scales would not favor transfer; add to the weight against transfer, the inconvenience to the plaintiff's witnesses on the issue of damages and the scales weigh heavily against transfer." 260 F. Supp. at 749.

Judge Mishler denied the transfer motion on the further ground that petitioner's argument, that should the transfer

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* Both the *Scaramuzzo* and *Schmidt* cases were settled after the motions to transfer were denied. Judge McGohey in denying petitioner's motion to transfer said "the reasons for denying the motions in *Schmidt* and *Scaramuzzo* apply equally here and are, accordingly, adopted" (P. A. 16a-17a).

be granted, and should petitioner's subsequent application for consolidation also be granted "substantial savings in time and money at both the trial and pretrial states" would result, was "illusory". The Court reasoned, inter alia, that on the basis of experience with air crash cases in that district, "the amount of duplication and inconvenience normally encountered when there are separate trials in multi-plaintiff accident cases is often exaggerated" and there was "no assurance that the promise of a single trial can be realized." 260 F. Supp. at 750.

On reargument, Judge Mishler reiterated his prior reasoning that a New York Court would be more familiar with applicable New York law than would be an Oklahoma court and he rejected petitioner's offer to pay the costs of plaintiffs and their witnesses to travel to Oklahoma as an attempt "to shift the inconvenience of pending actions in the various jurisdictions on to the shoulders of various claimants." 260 F. Supp. 752.

In rejecting petitioner's similar motion in *Schmidt*, Judge MacMahon concluded after reviewing the facts that neither the parties' nor the witnesses' convenience would be served by transfer. He further concluded that the interest of justice did not warrant the transfer. He reasoned that should transfer be ordered in the *Schmidt* case, petitioner's hopes of having all actions against it consolidated into one action in the transferee district were dim in view of the little likelihood that all cases in all other districts would be transferred to the Eastern District of Oklahoma and in view of the necessity for separate damage trials.

Judge McGohey, in rejecting petitioner's third attempt to transfer, held that the reasons for denying the motions in *Schmidt* and *Scaramuzzo* "apply equally here and are, accordingly, adopted." (P. A. 7).

Thereafter, petitioner sought a writ of mandamus in the Court of Appeals for the Second Circuit to compel Judge

McGohey to order the transfer arguing that Judge McGohey had abused his discretion in failing to consider certain proper factors and had erroneously evaluated proper factors. The petition was denied by a unanimous court.

ARGUMENT

The Court of Appeals did not employ an improper standard when it refused to issue the writ of mandamus. There is no conflict among the circuits.

Petitioner contends the Second Circuit ruled that mandamus could issue "only where there has been usurpation of judicial power, and will not issue for abuse of discretion" and in so doing was in direct conflict with this Court's decisions in *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379 (1953) and *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964) (pp. 16-17).

Petitioner has misread the opinion of the second circuit. That court did not reject the abuse of discretion test; rather, it found the lower court had not abused its discretion.

> "Where it is evident as here that the Judge has exercised his discretion in a judicial manner, and that the case before us is not a 'really extraordinary cause' we should summarily deny the petition for mandamus." 385 F. 2d at 938.

Petitioner has sought to contort the circuit court's statement that "occasional references in earlier opinions to the abuse of discretion were intended only as a gloss upon the 'really extraordinary causes' ruling" into a rejection of abuse of discretion as a criterion in determining whether mandamus should issue. By this language the court was not discarding abuse of discretion as a test but was merely warning against the use of mandamus to evade the prohibi-

tion against interlocutory appeals of nonappealable orders. The Circuit Court, in fact, quoted this Court in *Will* v. *United States*, 389 U. S. 90 (1967), where this very warning was given:

> "'Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.' *Hubert L. Will* v. *United States, supra*, 389 U. S. 90, 98 (1967)." (P. A. 12a.).

Petitioner, in contorting the language of the second circuit, has ignored the fact that the Supreme Court itself has viewed petitions for mandamus "as extraordinary remedies . . . reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 260 (1947).

Petitioner further contends there is a conflict among the circuits as to when mandamus should issue in transfer cases. It argues that while the Third, Fourth, Fifth, Sixth, Seventh, Tenth and District of Columbia Circuits issue mandamus when the lower court has abused its discretion, the First, Second and Ninth Circuits are more restrictive (P. 11). This contention is not borne out by a reading of the cases. Contrary to petitioner's contention, the First Circuit in *Teixeira* v. *Goodyear Tire & Rubber Co.* (261 F. 2d 153 (1st Cir. 1958), and the Second Circuit in this case and in *A. Olinick & Sons* v. *Dempster Bros., Inc.* (365 F. 2d 439 (2d Cir. 1966)), have held mandamus will issue for an abuse of discretion in transfer cases. Furthermore, in *Hartley Pen Co.* v. *United States District Court* (287 F. 2d 324 (9th Cir. 1961)), the Ninth Circuit, on the authority of *Gulf Research & Dev. Co.* v. *Harrison*, 185 F. 2d 457 (9th Cir. 1950), cited by petitioner as representing the more restrictive view in that circuit (P. 11), issued mandamus where the lower Court had abused its discretion in granting pre-trial discovery. There appears, therefore, to be no conflict among the circuits. Moreover,

petitioner fails to cite even one case holding the writ should not issue for such an abuse.*

Petitioner relies heavily on *General Tire & Rubber Co.* v. *Watkins* (373 F. 2d 361 (4th Cir.) *cert. denied*, 87 S. Ct. 1031 (1967)), as "the most striking example of a view exactly opposite to the rule promulgated by the Second Circuit" (P. 12). The Court in *General Tire*, granted the writ of mandamus on a finding that the district court had abused its discretion and that there were "extraordinary circumstances."** Rather than being opposite to the rule promulgated by the Second Circuit, it is the same. The Second Circuit refused mandamus because "the Judge has exercised his discretion in a judicial manner" (P. A. 11a) and because "there is nothing 'really extraordinary' about this cause. Nor are there any 'extraordinary circumstances'" (P. A. 12a).

Lastly, petitioner claims that in denying transfer the Second Circuit abdicated its duty of supervisory control imposed on it by *LaBuy* v. *Howes Leather Co.* (352 U. S. 249 (1957)). The Second Circuit in denying the petition for mandamus said "This is clearly not a case of judicial intransigence or persistent flouting of the Rules" (P. A. 12a). This being the case, petitioner's reliance on *LaBuy* is misplaced in as much as this Court in *Will* v. *United States*, said "we have no quarrel with LaBuy, which is simply inapposite where there is no showing of a persistent disregard of the federal rules" (389 U. S. 90, fn. 14).

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* In *In re Josephson*, 218 F. 2d 174 (1st Cir. 1954), the Court, by way of *dicta*, said that mandamus would not issue against a lower court which refused to transfer. The reasoning of the First Circuit was that it could not review such refusal because the review would not preserve its appellate jurisdiction. In *Josephson*, however, the court did hold that abuse of discretion would warrant the issuance of mandamus where the lower court had improperly ordered transfer.

** Unlike the case before the Second Circuit, the Court of Appeals in *General Tire, supra*, was confronted with a situation where there would be trials in two districts each for at least nine months and the parties in the transferor district were also parties to the action in the transferee district.

The District Court did not abuse its discretion in denying petitioner's motion for transfer.

Petitioner has "the burden of showing that its right to issuance of the writ is 'clear and indisputable' ". *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, 384 (1953); see, *Will* v. *United States,* 389 U. S. 90 (1967). For the District Court to have abused its discretion in denying petitioner's motion for transfer, its action must have been "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination . . .". *Wong Wing Hang* v. *Immigration and Naturalization Service,* 360 F. 2d 715, 719 (2d Cir. 1966).

The Opinion of Judge McGohey denying petitioner's motion for transfer specifically adopts the rationale of the *Schmidt* and *Scaramuzzo* courts which, as indicated above, acted on transfer motions arising out of this same accident. The implication of petitioner's contention, therefore, is that three judges acted "without rational basis", "inexplicably departed from established policies" and their decisions "rested on an impermissible basis."

None of the plaintiffs in the actions now sought to be transferred resides in Oklahoma; nor does petitioner. Of the 48 unsettled cases as of the time of petitioner's motion, 15 involved injured passengers or survivors of deceased passengers who resided in the New York, New Jersey and Connecticut area. Only one involved an Oklahoma resident. Thus in terms of convenience to plaintiffs, their convenience is served by the action being brought in the Southern District of New York.

The fact that plaintiffs have instituted their action in New York is to be accorded substantial weight. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1946). Rather than accord it substantial weight, petitioner denigrates plaintiffs' choice as forum shopping. Rather than move to transfer the al-

loged forum shoppers to the forum of their residence (petitioner ignores the fact that five actions are by New York residents), petitioner moves to transfer the cases to Oklahoma where none of them reside. In so doing, petitioner is bathed in the spotlight of its own accusation. It is forum shopping for what it concedes in its petition is a lower verdict than plaintiffs would be entitled to in the forum of their choice.

Nor does petitioner's offer to pay the expenses of the plaintiffs for their proposed sojourn to Oklahoma transform the inconvenience of prosecuting their claim in Oklahoma into convenience.

There has been no "clear and indisputable" showing by petitioner that trial in New York would be more inconvenient. Judge Mishler said "in summary, the defendant in this application seeks to shift the inconvenience of pending actions in the various jurisdictions on to the shoulders of the various claimants." 260 F. Supp. at 752; and Judge MacMahon in *Schmidt* held that petitioner by carrying soldiers from state to state, accepted the inconvenience and expense of defending suits throughout the country.

Nor would transfer result in a single trial in Oklahoma as petitioner asserts. This is so because separate damage trials will be required for each case. Furthermore, the most important factual issues in this case will revolve around damages not liability. The cause of this accident was the coronary insufficiency suffered by the pilot, petitioner's president, incapaciting him from controlling the fatal aircraft. This heart condition had been known to him for 19 years. Thus the location of damage witnesses rather than liability witnesses is more material in the present circumstances. The convenience of the damage witnesses is best served by a trial of the present cases in New York rather than in Oklahoma.

In support of its petition for mandamus petitioner listed forty-four witnesses whom it maintained would have to

testify. Judge MacMahon in *Schmidt* held that the testimony of most of these same witnesses was cumulative and of an immaterial nature. He arrived at his conclusion on the basis of petitioner's description of what their testimony would be fortified by the fact that of the forty-four only ten testified at the Civil Aeronautics Board hearing investigating the accident. As to those witnesses who are its employees, Judge MacMahon reasoned "All of these witnesses are under defendant's control and can testify in New York, if defendant desires. We are not convinced that defendant would suffer oppressive or unusual expense or inconvenience in transporting its own employees to New York where it does business." 260 F. Supp. at 814.

Judge MacMahon found further that defendant made no showing that its records could not as easily be produced in New York as in Oklahoma.

In short, petitioner has failed to show that the district court abused its discretion or that this case or the circumstance surrounding it were so extraordinary as to justify the issuance of the writ of mandamu.

CONCLUSION

The petition for certiorari should in all respects be denied.

Respectfully submitted,

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